United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

74-1598

B P/S

To be argued by
WILLIAM F. MCNULTY

United States Court of Appeals
FOR THE SECOND CIRCUIT

RENEE KALSCHEUR, a minor, by her parents and natural guardians, and NORBERT KALSCHEUR, and ISALBEL KALSCHEUR, in their own rights,

Plaintiffs-Appellees,

against

JACK ROUNICK and LOIS ROUNICK and
215 EAST 68TH STREET, INC.,

Defendants-Appellants.

REPLY BRIEF FOR DEFENDANTS-APPELLANTS, JACK ROUNICK AND LOIS ROUNICK

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Scope of Reply Brief

As this Court will see when it reads the brief of Defendants-Appellants, they do not "rely solely on *Bua* v. *Fernandez,* 15 N.Y. 2d 664, as authority for their position that the court should have dismissed plaintiffs' complaint or entered a directed verdict" in favor of Defendants-Appellants, as asserted on page 13 of the brief of Plaintiffs-Appellees.

Although Defendants-Appellants urge other legal arguments in support of their contention that the complaint herein should have been dismissed or that a verdict should have been directed in their favor in the Court below, the

present reply brief is addressed solely to the attempt by Plaintiffs-Appellees to distinguish the *Bua* case from the case at bar because, in the event that this Court concludes that the *Bua* case is indistinguishable from the case at bar, it is submitted that the holding in that case is in all respects determinative of the issue of liability presently before this Court.

POINT I

Bua v. *Fernandez*, 15 N.Y. 2d 664, is indistinguishable from the case at bar.

Plaintiffs-Appellees under Point I of their brief have gallantly but, it is submitted, unsuccessfully, tried to distinguish the *Bua* case from the case at bar on two grounds, to wit: first, that *Bua* should be limited to its own facts which they claim are significantly different from the facts in this case and, secondly, that the Court of Appeals in *Bua*, in reversing the order of affirmance of the Appellate Division and adopting the dissenting opinion of that Court that the complaint should be dismissed under the New York social guest rule, "indicated that there was no evidence that the defendant homeowners knew the door was a trap or hidden danger" (Appellees' Br., pp. 13-14).

It is submitted that, by so arguing, the plaintiffs have clearly misread both the record in the *Bua* case and the dissenting opinion of the Appellate Division therein, on which the Court of Appeals predicated its reversal and dismissal of the plaintiff's complaint.

The factual distinction sought to be drawn by Plaintiffs-Appellees on page 13 of their brief that in *Bua* "no testimony was offered to show that the glass door in the playroom had been opened by anyone prior to the accident on that day so as to give Bua reason to believe the door was open" is, it is submitted, clearly, a distinction without reason from the proof adduced in the

case at bar that Miss Kalscheur had opened the patio door only minutes before she blindly walked into it. As far as the New York social guest rule is concerned, it matters little how the patio doors in the two cases under discussion came to be closed at the time that the accidents occurred since, in both cases the respective plaintiffs "thought the door was open" (*Bua, supra,* p. 665). Why each plaintiff may have believed the door was open, when it was not, has absolutely no bearing on the issue of the duty owed by the host to his guest under the New York social guest rule, which is simply to warn her of a trap or dangerous conndition of which she is unaware but of which the host is aware. The other facts mentioned in the Plaintiffs-Appellees' brief concerning prior visits to the premises and familiarity with the doors in question are markedly similar in the two cases.

The Plaintiffs-Appellees' contention that *Bua* and the instant case are distinguishable on the ground that in *Bua* the Court of Appeals predicated its dismissal on the lack of evidence in that record that the door "was dangerous" or that "defendants knew that it was dangerous" (Appellees' Br., pp. 13-14), while in the case at bar there was proof that on two prior occasions the Rounicks had difficulty with the door (46a-47a, 49a-50a), is admittedly nothing more than a "indication" or impression taken by them from their own reading of the record in *Bua.* As this Court will observe, however, from an unadorned reading of the brief dissenting opinion of the Appellate Division in *Bua,* which became the ultimate decision in the case, no such finding was ever made by the dissenting Justices of that Court, who voted "to reverse the judgment and to dismiss the complaint on the ground that under the circumstances here the glass door did not constitute a trap or hidden danger of which the infant plaintiff, a social visitor, was unaware; and hence the defendant owner did not have any duty to give said plaintiff special notice or warning with respect to such door" (*Bua* v.

Fernandez, 21 A.D. 2d 887-888). Nothing was said in that dissenting opinion or in the order of reversal and dismissal of the Court of Appeals, which adopted the reasoning thereof, about there being "no evidence that the defendant homeowners knew the door was a trap or hidden danger", as Plaintiffs-Appellees would now have this Court believe (Appellees' Br., p. 14). If there is anything that is manifest in the dissenting opinion of the Appellate Division in the *Bua* case and the order of dismissal of the Court of Appeals incorporating it by reference, it is that when a social guest is as fully aware of the presence of a potential danger on the premises she is visiting as the nine-year old Bua girl was, then the New York social guest rule bars a recovery against her host for personal injuries sustained by her when she herself confronts the danger. It is submitted that, based on the undisputed proof of Miss Kalscheur's own prior awareness of the presence of the unmarked pane of glass in the patio door involved in the case at bar, which she herself opened only minutes before she walked headlong through it, the situations presented in the case at bar and the *Bua* case are identical and no amount of argument on the part of the Plaintiffs-Appellees herein can change the picture one iota. Accordingly, the result reached in the case at bar should be the same as the one reached in the *Bua* case.

Dated: New York, New York, August 29, 1974.

Respectfully submitted,

DANIEL J. COUGHLIN
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Jack Rounick and Lois Rounick

WILLIAM F. MCNULTY
ANTHONY J. MCNULTY
Of Counsel

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AFFIDAVIT OF SERVICE BY MAIL

State of New York, County of New York **ss.:**

Raymond J. Braddick, agent for Daniel J. Coughlin Defendants-Appellants **being duly sworn deposes and says that he is the attorney for the above named herein. That he is over 21 years of age, is not a party to the action and resides at** 8 Mill Lane Levittown, New York

That on the 10th **day of** September **, 19**74 **, he served the within**

Reply Brief

upon Kremer Krimsky & Luterman Esqs. of Counsel to Norman Landau **attorney s for the above named** Plaintiff

by depositing 3 true copies **of the same securely enclosed in a post-paid wrapper in the Post Office regularly maintained by the United States Government at 90 Church Street, New York, New York**

directed to the said attorney for the Plaintiffs-Appellees

at No. One East Penn Square, Philadelphia, Pennsylvania

, that being the address within the state designated by them for that purpose, or the place where they then kept an office, between which places there then was and now is a regular communication by mail.

Sworn to before me, this 10th.

day of September **19**74

Raymond J. Braddick

Roland W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1975